

licence to drive and he needed the accused to take over the wheel in case of police road blocks. The question is – why would Joe and Man, who it is clearly implied were criminally involved in the trafficking of the cannabis in the bag, at the spur of the moment, if the meeting Joe and the accused was by chance as stated by the accused, risk taking the accused, a mere acquaintance, for a dangerous operation of presumably taking drugs either from near Sanglang or Sungai Baru? These were places where the accused claimed they went to; near a railway crossing near Sanglang the two disappearing in the car leaving him there for a long while; at Sungai Baru Man taking off in the car and not coming back until much later. Did the accused intend otherwise to suggest Joe and Man knew he was still in Alor Setar? But his evidence was that before 25 December he did not meet Joe after 22 December and he did not meet Man after 21 December and it is clear he did not tell them he was staying in Alor Setar. I find the story as also highly improbable. My view is that nothing in his elaborate background story detracts from the clear evidence of the prosecution that he was in possession of the bag of cannabis, not his companion, whatever may be that man's name.

As to the nature of the drugs the accused has not rebutted on a balance of probabilities the presumption that he knew the drugs were cannabis. He ran away when he saw the police and he threw away the bag containing the drugs.

As for the presumption of trafficking there was nothing in the evidence which, on a balance of probabilities, rebutted the presumption that he was trafficking in the 409.7 gm of cannabis as specified in the charge.

I accordingly find him guilty on the charge and I convict him.

Order accordingly.

Solicitors: *Naughton Christie & Co.*

Reported by *Yap Shao Sin*

A **Tye Chwee Hoon v Cayman Commodities (M) Sdn Bhd & Anor**

HIGH COURT (PENANG) – SUIT NO 22-152-1988
MOHAMED DZAIDIN J
9 JANUARY 1989

B *Civil Procedure – Writ filed against defendant whilst appeal under Commodities Trading Act was pending – Failure of plaintiff to exhaust right under Act – Decision under Act final – Whether plaintiff can proceed with action – Commodities Trading Act 1985, s 46*

C *Civil Procedure – Complaint lodged against defendant under Commodities Trading Act – Enquiry conducted and plaintiff awarded compensation by Commission – Plaintiff dissatisfied with quantum awarded – Writ filed against defendant – Relitigation of identical issues – Whether an abuse of the process of court*

D *Civil Procedure – Conditional appearance filed out of time – Failure to file defence – Short service of defendant's application – Whether these were mere technicalities curable under O 2 r 1 and O 3 r 5 of the Rules of the High Court 1980*

The plaintiff was a client and customer of the first defendant in some commodities futures trading transactions. She entered into various transactions with the first defendant and paid substantial sums of money. Later, she discovered that she had been taken for a ride in these transactions by the first defendant and a complaint was lodged with the Commodities Trading Commissioner. An enquiry into her complaint was conducted and the plaintiff was awarded compensation in the sum of \$58,728 to be paid from the statutory deposit kept by the second defendant. She was dissatisfied with the quantum awarded and appealed to the Commission, claiming that as she had paid the first defendant an equivalent sum of 5,872,800 Japanese yen she should be compensated the said amount at the current exchange rate, which was \$125,149.36. In the meantime, the plaintiff filed a writ against the second defendant for an order that the latter pays her the sum of \$125,149.36 from the statutory deposit of the first defendant which is held by the second defendant under the Commodities Trading Act 1985 ('the Act'). The second defendant then applied to the court to strike out the plaintiff's claim under O 18 r 19 of the Rules of the High Court 1980. In addition, the plaintiff also applied for an interim injunction against the second defendant restraining the latter from releasing the sum of \$125,149.36 from the statutory deposit pending the final disposal of the suit or until further order.

H At the outset of the hearing of these applications, the plaintiff raised three preliminary objections against the second defendant's application stating that (a) the conditional appearance of the second defendant to her writ was filed out of time in contravention of O 3 r 2 of the Rules of the High Court 1980; (b) the second defendant failed to file his defence in time which entitled her to a judgment in default under O 19 r 2; (c) there was short service of the second defendant's application. On these grounds, the plaintiff claimed that the second defendant should be precluded from defending the claim and judgment be entered against him.

Held, allowing the second defendant's application and dismissing the plaintiff's application:

(1) The preliminary objections raised were mere technicalities curable under O 2 r 1 and O 3 r 5 of the Rules of the High

Court 1980. As for the second point of objection, there was no necessity to file the defence after filing a conditional appearance and when there is a pending action by the second defendant to strike out the plaintiff's writ and statement of claim.

(2) At the time of filing the writ, the plaintiff had failed to exhaust her right under the Commodities Trading Act 1985 because she filed the writ before the Commission had given its decision on her appeal. As the appeal had been dismissed and as the decision is final under s 46 of the Act, she cannot proceed with the present action based on the same issues.

(3) Furthermore, as the plaintiff's claim is simply over her dissatisfaction against the Commissioner's decision regarding the award, it would be an abuse of the process of the court to allow her to relitigate identical issues which had already been decided in her favour, yet to her dissatisfaction.

(4) As to the plaintiff's claim against the quantum awarded as compensation, there is no merit in her claim because reg 17(3) of the Commodities Trading (Dealers, Commodity Trading Advisers and Representatives) Regulations 1980 speaks of 'actual pecuniary loss' suffered by the plaintiff.

Cases referred to

- 1 *Ganda Oil Industries Sdn Bhd & Ors v KL Commodity Exchange & Anor* [1988] 1 MLJ 174 (refd)
- 2 *Drummond-Jackson v British Medical Association* [1970] 1 WLR 688 (refd)

Legislation referred to

- Commodities Trading Act 1985 ss 3(1), 4, 5, 9(1), 11, 33, 37, 38, 40(1)(c), 46
Commodities Trading (Dealers, Commodity Trading Advisers and Representatives) Regulations 1980 reg 17
Rules of the High Court 1980 O 2 r 1, O 3 rr 2, 5, O 18 r 19(1)(a)

Plaintiff in person.

Tuan Haji Sulaiman bin Abdullah for the second defendant.

Cur Adv Vult

Mohamed Dzaidin J: There are two applications in this suit. In encl 4, the plaintiff prays for an interim injunction against the second defendant restraining the latter from releasing a sum of \$125,149.36 from the statutory deposit of the first defendant which is held by the second defendant under the provisions of the Commodities Trading Act 1985 ('the Act') pending the final disposal of the suit or until further order. In encl 23, the second defendant applies to strike out the plaintiff's claim against him under O 18 r 19 of the Rules of the High Court 1980 on the grounds stated therein.

At the outset of the hearing of this application on 21 November 1988, the plaintiff, who conducted the proceedings in person, raised a preliminary objection against the second defendant's application (encl 23). The grounds of her objection are stated in a written note which was prepared with the assistance of some lawyers, who were her former students. First, she stated that the conditional appearance of the second defendant to her

A writ was filed out of time in contravention of O 3 r 2 of the Rules of the High Court. Secondly, the second defendant failed to file his defence in time which entitled her to a judgment in default under O 19 r 2. Thirdly, there was short service of the second defendant's application in encl 23. On these grounds, she claimed that the second defendant should be precluded from defending the claim and judgment be entered against him. After hearing the reply by Haji Sulaiman Abdullah for the second defendant, I overruled the plaintiff's preliminary objection on the ground that the points raised were mere technicalities curable under O 2 r 1 and O 3 r 5 of the Rules of the High Court. As for the second point of objection, there was no necessity to file the defence after filing a conditional appearance and when there is a pending action by the second defendant to strike out the plaintiff's writ and the statement of claim.

Having examined both applications, I propose to deal with the second defendant's application (encl 23) first. This is an application to strike out the plaintiff's writ and statement of claim against the second defendant on the grounds stated under O 18 r 19(1)(a), (b) and (d). There was no supporting affidavit filed by the second defendant. However, Haji Sulaiman relied entirely on the plaintiff's statement of claim and he based his submissions on the relevant provisions of the Act.

In a nutshell, the plaintiff's claim against the second defendant is for an order that the latter pays her the sum of \$125,149.36 being the amount equivalent to the prevailing exchange rate of Japanese yen from the statutory deposit of the first defendant held by the second defendant under the provisions of the Act.

In order to get a clearer picture of the present dispute, let me summarize the facts of the matter as gathered from the plaintiff's affidavit (encl 3). The plaintiff was a client and customer of the first defendant in some commodities futures trading of Tokyo red beans. She entered into various transactions with the first defendant between 1984 and March 1985 and paid a substantial sum of money. Later, when she discovered that she had been taken for a ride in these transactions by the first defendant, she quickly lodged a complaint with the Commodities Trading Commissioner established under the Act. The Commissioner conducted an enquiry into her complaint on 28 June 1985, and found that she had sustained pecuniary loss because of a default committed by the first defendant. In the result, the plaintiff was awarded compensation in the sum of \$58,728 to be paid from the statutory deposit kept by the second defendant. She was formally informed of her right of appeal under s 46 of the Act. So, on 30 September 1987 she sent her letter of appeal to the Commission. Looking at her letter (exh TCHS in encl 3), her only ground of appeal was on the quantum of the compensation. She claimed

that as she had paid the first defendant a sum of equivalent of 5,872,800 Japanese yen she should be compensated the said amount at the current exchange rate, which was \$125,149.36.

In the meantime, on 26 October 1988 she filed the present writ. On the hearing of this present application on 21 November 1988, the plaintiff orally informed me that her appeal had been dismissed by the Commission.

The law

The Act, which superseded the 1980 Act, established the Commodities Trading Commission to provide, inter alia, for the establishment of a commodity exchange, to control the trading in commodity futures contracts. The first defendant was a registered dealer within the meaning of s 33. The second defendant is the person appointed under s 9(1) and his specific powers are provided under s 11. However, his powers and functions are not the same as those of the Commission. In the case of the Commission, which is established under s 3(1), its functions are mainly supervisory and in particular to take reasonable measures to safeguard the interest of persons, like the plaintiff in this case, who traded in commodity futures contracts and to suppress illegal and improper practices in relation to trading in commodity futures contracts and price manipulations (s 4). In carrying out its functions, the Commission has various powers under s 5. Paragraph (e) of this section gives the Commission power to hear and determine any appeal which is appealable to the Commission, and under s 46 any person aggrieved by the decision of the Commissioner under any of the matters mentioned in the section, may, within one month after he is notified of the decision, appeal to the Commission, whose decision shall be final.

The first defendant was registered as a dealer by the Commissioner under s 37 upon payment of a deposit of \$750,000 in compliance with s 38. This deposit was paid into 'Futures Trading Deposits Account' administered by the Commissioner. Section 40(1)(c) provides that where the Commissioner has reason to believe that any person has sustained pecuniary loss because of a default committed in the course of or in connection with commodity futures trading business of a dealer, the Commissioner may forfeit all or any part of the deposit paid under s 38. Paragraph 3 states that the deposit or part thereof forfeited shall be applied by the Commissioner in accordance with regulations made under the Act. The Commodities Trading (Dealers, Commodity Trading Advisers and Representatives) Regulations 1980 are the relevant regulations ('the Regulations'). Part III of the Regulations concerns the procedures for the application of deposits. Regulation 17 provides that where a deposit or part of the deposit is forfeited under s 40 of the Act, such deposit shall be applied by the Commissioner

A for the purpose of compensating persons who establish claims for pecuniary loss against the dealers. Perhaps, it is worthy to mention here that under para 3 of reg 17, the amount which any claimant is entitled to claim as compensation is the amount of the actual pecuniary loss suffered by him, plus reasonable costs and disbursements.

B Thus, after examining the facts and relevant provisions of the law, can it now be said that the plaintiff's writ of summons and the statement of claim disclose a reasonable cause of action against the second defendant or raise some questions fit to be decided by this court? As no affidavit evidence is admissible, I need to address myself simply on the statement of claim.

C The statement of claim contains 15 paragraphs and six prayers. Without reciting them, I find paras 10, 11, 12 and 13 are relevant to the second defendant. In essence, they refer to the statutory deposit, the inquiry conducted by the second defendant and his decision, the appeal to the Commission and finally the amount expended in Japanese yen. Based on these paragraphs, the plaintiff prays for an injunction first restraining the second defendant from paying out the sum \$125,149.36 from the statutory deposit and secondly, the said sum be paid to her.

F Clearly, the plaintiff's claim against the second defendant and her right to the payment of compensation are derived from the provisions of the Act, the relevant sections of which I have adverted to above. At the outset, it is crucial to note that at the time of her filing the writ she had failed to exhaust her right under the Act because she filed it before the Commission had given its decision on her appeal. Evidently, the appeal had been dismissed and under s 46 of the Act, the decision is final. In the result, she cannot proceed with the present action based on the same issues. She could, of course, resort to an application for judicial review if the decision-making process of the Commission was not exercised in a proper manner. Whether or not a judicial review is available, see *Ganda Oil Industries Sdn Bhd & Ors v KL Commodity Exchange & Another*.¹

H Be that as it may, upon considering the entire statement of claim, in my opinion, the plaintiff's action in this suit against the second defendant is a relitigation of the matter which had already been finally adjudicated by the Commission with no right of a further appeal. In short, the plaintiff's present claim is simply over her dissatisfaction against the quantum awarded as compensation by the second defendant to be paid from the statutory deposit. See para 13 of the statement of claim where she alleged that she had expended 5,872,800 Japanese yen and she should therefore be paid the ringgit equivalent at the material time. On this issue, I find there is no merit

in her claim because reg 17(3) of the Regulations speaks of 'actual pecuniary loss' suffered by the plaintiff.

'A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered' (per Lord Pearson in *Drummond-Jackson v British Medical Association*²). Therefore, after considering the statement of claim in the context of O 18 r 19(1)(a) and for reasons stated above, in my judgment, the plaintiff's writ and statement of claim disclose no reasonable cause of action or raise any question fit to be tried by me.

I have also been persuaded at this stage, on the basis of the pleadings, to make a finding that the plaintiff's action is 'an abuse of the process of the court'. I have earlier mentioned what her grievance in this action was. She was merely dissatisfied with the decision of the Commissioner regarding the award. Hence, in my opinion, it

A would be an abuse of the process of the court to allow her to relitigate identical issues which had already been decided in her favour, yet to her dissatisfaction.

B All in all, I am fully satisfied that this is a proper case where the plaintiff's writ and statement of claim should be struck out. Accordingly, I allow the second defendant's application with costs.

C In view of the above decision, I dismiss the plaintiff's application for an injunction against the second defendant as per encl 4. I make no order as to costs.

Application dismissed.

Solicitors: *Zain & Co.*

Reported by *Ng Sheau Jiuan*
